

**ANTICIPATED ACQUISITION BY ADOBE OF FIGMA**  
**PARTIES' RESPONSE TO THE CMA'S REMEDIES NOTICE**

**14 December 2023**

**Introduction**

1. The Parties strongly disagree with the CMA's provisional findings ("PFs"). They observe that, whilst formally leaving the door open for the Parties to make a remedies proposal, the Notice of Possible Remedies ("NPR") strongly signals that no remedy package that preserves the benefits of the Transaction will be sufficient to resolve the competition concerns identified in the PFs. The NPR effectively points to either a prohibition of the Transaction or the divestment of Figma Design (which effectively means the full divestment of Figma / a prohibition).
2. Against this background, this response to the NPR is confined to making certain observations on the scope of the issues identified in the PFs and remedies options outlined in the NPR. The Parties look forward to providing further submissions on the substance of the PFs to the CMA in their response to the PFs as well as at the hearing scheduled for 21 December 2023.

**The Parties' Position on the CMA's provisional findings**

3. The Parties strongly disagree with the CMA's provisional view that the Transaction will result in a substantial lessening of competition ("SLC") in all-in-one product design software, vector-editing software, and raster-editing software. The PFs contain fundamental legal, analytical and evidential errors that the Parties will address in a separate response to the PFs ("**Response to the PFs**").
4. In summary, the Parties consider that the Response to the PFs will demonstrate clearly that no SLC will result from the Transaction and so no remedies will be required:
  - (a) The Transaction would not remove a close competitor or an important competitive constraint on Figma for the global supply of all-in-one product design software for professional users:
    - (i) *First*, Adobe was not able to develop the features necessary for Adobe XD to be commercially successful. The commercial failure of XD which persisted over a number of years ultimately led to its disinvestment.
    - (ii) *Second*, Project Spice, an internal effort that was only ever built to provide ideation features, was never developed beyond the project stage and was never realistically going to compete with Figma: the clear directive from Adobe executives was to focus on ideation and marketing design use cases. As is often the case with early exploration, Project Spice ultimately failed to find a relevant product market fit and was shut down so that scarce

engineering resources could be focused on the more significant commercial opportunities in Adobe Express and Adobe Firefly, which were much more likely to launch successfully.

- (iii) *Third*, decisions around Adobe XD disinvestment and Project Spice termination were made for clear and obvious business reasons and independent from the deal discussions with Figma. Absent the Transaction, Adobe would be incapable of continuing to compete and innovate in the supply of all-in-one product design software, in other organic or inorganic ways, and would be better served with an investment in growth areas like Adobe Express and Adobe Firefly.
  - (iv) *Fourth*, the merged entity will continue to compete against, and be constrained by, a plethora of other well-established product design tools as well as new highly innovative players (including design-to-production focused tools) that have recently entered this space.
  - (v) *Fifth*, a proper reading of the internal documents does not support the provisional finding that the Parties are close competitors.
- (b) The Transaction would not remove a dynamic competitive constraint on Adobe in vector or raster editing software.
- (i) *First*, as the CMA accepts, Figma has very limited vector and no raster editing functionalities today. Figma's internal documents, together with corroborating executive testimony, economic analysis, and its actions/decision-making to date show that it has neither the ability, incentive nor intention (let alone all three) to develop advanced vector and raster editing functionalities (let alone within a reasonable timeframe that would be relevant for any merger control analysis by the CMA). Figma is certainly not better placed than many other established players (many of whom are already active) to enter or expand in this space. Even if possible, Figma would have to dedicate significant investment and resources towards functionality (and a user base) with which it is completely unfamiliar. Any such endeavors would also divert Figma from (and undermine) its current roadmap focused on serving product designers and web developers. It is therefore not rational to find that Figma is motivated, and able, to enter the markets for advanced vector or raster editing.
  - (ii) *Second*, a proper reading of Adobe's internal documents and third party evidence does not support the proposition in the PFs that Figma poses a material threat to Adobe's vector or raster editing software.
  - (iii) *Third*, Adobe's product development in relation to vector and raster editing software is not driven by an alleged perceived threat from Figma. A rational assessment of the evidence demonstrates that there are many players who are already active in vector and raster editing software and/or are far better

placed than Figma to impose a dynamic competitive constraint on Adobe. As a result of these competitive dynamics, even if the CMA was able to show that Figma has the ability, incentive and intention to develop advanced vector and raster functionality within a reasonable timeframe (as the CMA is bound to under its own Merger Guidelines), the CMA would be unable to show that the Transaction would have a substantial impact on competition as a whole.

- (iv) *Fourth*, the PFs' assertion that Adobe has an "entrenched" position in vector and raster editing software is unevidenced and divorced from market realities. Adobe faces, and is continuously innovating to respond to, strong competitive threats (including from players such as Microsoft, Google and Apple) and disruptive industry-wide trends (such as artificial intelligence). It is also based on a static finding of alleged market strength that is inconsistent with what otherwise purports to be an assessment of dynamic competition.

- 5. The Response to the PFs will also demonstrate that the CMA's analysis in the PFs is vitiated by serious errors of law and fact. Notably, it:
  - (a) fails to identify a coherent counterfactual against which to establish whether the Transaction results in an SLC;
  - (b) fails to assess properly current and potential competition between the Parties, which is a critical step to establishing how competition may have evolved absent the merger (and informs the analysis of dynamic competition) - this is contrary to the Competition Appeal Tribunal's guidance in *Meta/Giphy*;
  - (c) fails to consider properly the competitive dynamic that the CMA alleges would have prevailed absent the Transaction, by relying exclusively on subjective, rather than objective, evidence;
  - (d) irrationally rejects the clear and consistent evidence, including that given under oath, by senior executives, without proper justification;
  - (e) fails to assess properly how third party competitor products may have evolved in the relevant timeframe, despite such an assessment being a critical element of any forward-looking merger assessment and/or assessment of dynamic competition; and
  - (f) takes an irrational approach to the gathering and appraisal of evidence, including placing excessive weight on internal documents and failing to assess such documents in their full and proper context based on the totality of evidence before the CMA (which the CMA was required to).

## The Parties' Position on the CMA's Notice of Possible Remedies

6. In the NPR, the CMA identifies the possible remedies as either prohibition of the Transaction or the divestment of overlapping operations in interactive product design, raster editing and vector editing. However, the NPR expresses skepticism as to any divestment involving Adobe assets and notes that a divestment involving Figma Design is akin to a prohibition (but with added risk).
7. A structural divestment of Figma Design to address the concerns raised by the CMA in product design and in raster / vector editing would (as explained further below) mean that the significant benefits of the Transaction (including relevant customer benefits) would be lost and would be disproportionate.
8. **A divestment of Figma Design is wholly disproportionate to address the minimal and declining competition offered by Adobe XD and taking into account the fact that Project Spice was never launched.** The CMA has provisionally found that the Transaction may result in an SLC in the market for the global supply of interactive product design software.<sup>1</sup> But, as outlined above, the Transaction would not have such an effect. This is based on a competitively insignificant overlap between Figma Design and Adobe XD (a product which, even prior to being placed in maintenance mode, exerted a minimal and declining competitive constraint on Figma) and a hypothetical future overlap between Figma Design and Spice (an early stage R&D project for which a product was never built and never launched). In this context the divestment of the entirety of Figma Design would be wholly disproportionate.
9. **Any structural divestment remedy is wholly disproportionate to the size of the vector and raster-editing SLCs.** The CMA has provisionally found that the Transaction may result in SLCs in the markets for the global supply of vector-editing and raster-editing software.<sup>2</sup> The Parties do not agree with this provisional finding for the reasons summarised in paragraph 4(b) above and set out in further detail in Response to the PFs. Requiring a multi-billion dollar global divestment of Photoshop or Illustrator in order to address an uncertain and speculative theory of harm is wholly disproportionate (particularly in circumstances where the impact on competition (if any) would not come close to being substantial, nor occur within any timeline relevant to the CMA's merger review). This is also the case in requiring a divestment of the entirety of Figma Design.
10. **A divestment remedy will reduce investment and innovation and ultimately harm the parties customers.** In considering dynamic competition, the CMA must also conduct a broader cross-check on disbenefits of intervention, including the impact on incentives to invest and innovate in the UK, as well as the costs imposed on the Parties. As the Competition Appeal Tribunal notes “[u]nwise intervention can just as easily lessen

---

<sup>1</sup> Provisional Findings, paragraph 8.343.

<sup>2</sup> Provisional Findings, paragraph 8.343.

*competition as an unwise failure to intervene.*”<sup>3</sup> Adobe has been clear that the assets, know-how, talent and revenues acquired as part of the Figma business will be used to facilitate investment in developing new products and services. Without the assets, know-how, talent and revenues from Figma, Adobe will not be able to develop the new products and services it aims to be able to offer as a result of the Transaction. A divestment remedy will deprive the Parties’ current and future customers of these anticipated synergies, and the new products, services and innovations that can come about as a result of the Transaction.

11. In *Meta/Giphy*, the CAT recognized that in some instances, disapproval of a merger may have a chilling effect on innovation more generally:

*“Entrepreneurs like those who founded GIPHY will have at least half an eye on future acquisition by a behemoth like Meta, and this may inspire, rather than eliminate, innovation and enhance consumer benefit. In short, and as we have considered, acquisition by a larger undertaking may allow the smaller (acquired) undertaking to flourish and, on that basis, be considered as procompetitive.”*

12. Figma is a start-up company which would benefit substantially from the resources and reach that Adobe, as an established company in the complementary creative design space, is able to provide and the acquisition offers a key exit route for its founders. This is a sector characterized by swift entry and expansion by multiple new players, bringing new innovations, technologies and solutions. Their incentives to grow and innovate in the UK will be substantially undermined by foreclosing effective exit strategies to other industry participants.

### **The Parties’ Position on Potential Remedies and Next Steps**

13. As noted above, while formally leaving the door open to the Parties to make a remedies proposal, the NPR strongly signals that no remedy package that preserves the core features of the Transaction will be sufficient to resolve the PFs’ competition concerns relating to interactive product design (TOH1) and vector editing and raster editing (TOH2).
14. The Parties are disappointed, but not surprised, that the NPR takes this line given the way in which the PFs construct and conclude on the CMA’s theories of harm. However, in the Parties’ view, the critical shortcomings in this case are with the PFs themselves. Faced with the provisional conclusions in the PFs and their accompanying NPR, Adobe is not proposing a remedy package in response to the NPR.
15. The Response Hearing provides a formal opportunity for the Parties to address the CMA decision-makers in person. The Parties therefore propose to use that time principally to highlight the PFs’ substantial errors of analytical approach and evidential assessment, in particular:
  - (a) The PFs’ approach to gathering and appraising evidence and weight given to different forms of evidence, notably: the PFs’ undue reliance on selective internal

---

<sup>3</sup> *Meta Platforms Inc. v CMA* [2022] CAT 26, 14 June 2022, paragraph 110.

documents as a primary source of evidence; the PFs' improper interpretation of those documents; and the unduly limited weight the PFs placed on other sources of evidence including quantitative and technical evidence as well as oral testimony from senior executives that either provide important context to or contradict the CMA's findings.

- (b) The PFs' approach to applying the tests set out in *Meta / Giphy* to establish a dynamic theory of harm, notably: the need to assess properly current competition between the parties as a critical starting point for establishing how competition would have evolved absent the merger; the basis for the PFs' conclusions as to the likely evolution of Adobe's and Figma's activities in each other's areas of activity on a forward looking basis; and, the PFs' failure to evaluate how third parties' rival offerings would evolve in the relevant timeframe.
  - (c) The PFs' static (or even backward looking) approach to evidence when assessing the likely evolution of a dynamic and fast moving market, in particular the lack of analysis of whether and how in the counterfactual Adobe could in a reasonable timeframe overcome the technical challenges Adobe XD faced; and how likely it would be that Figma would enter raster or vector editing; and
  - (d) The basis on which the CMA believes that any loss of competition would be substantial taking into account the PFs' failure to evaluate competitor expansion plans in particular in relation to raster and vector editing.
16. The Parties trust that using the Response Hearing in this way will assist the CMA in its subsequent consideration of the Parties' detailed, written Response to the PFs. The Parties will of course also engage constructively with the CMA's questions and areas of interest at the Response Hearing regardless whether on the PFs or on the NPR.